EPA Approval of State Assumption of Clean Water Act Section 404 Program

Streamlined Approach to Address Endangered Species Act Incidental Take Coverage

States and the federal agencies charged with administering Section 404 of the Clean Water Act ("CWA")—the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps")—have expressed growing interest in promoting state assumption of the program. As an important part of the cooperative federalism structure of the CWA, state assumption can streamline and speed permitting processes, reduce duplication of effort and overall expenditures by state and federal authorities, and can better align the Section 404 program with other CWA programs for which states have authority. Virtually all states have delegated authority to administer the national pollution discharge elimination system ("NPDES") permitting program under CWA Section 402, as well as permitting programs under the Clean Air Act and other major environmental statutes. Only two states, however, have assumed authority for the CWA Section 404 program: Michigan in 1984 and New Jersey in 1994.

While many states have considered Section 404 assumption, there is a significant unresolved obstacle cited by those states: how to address potential liability under the Endangered Species Act ("ESA")—both for the state permitting authority and for permittees—for any incidental take of threatened or endangered species resulting from a Section 404 permit issued by the state. Where the Corps administers the Section 404 program, a streamlined process under Section 7 of the ESA allows for incidental take of listed species. However, thus far, where a state administers the Section 404 program, permittees themselves must avoid entirely adverse impacts to listed species or otherwise seek an incidental take permit under ESA Section 10 separate and apart from the Section 404 permit process, which can take years to complete in contrast to the Section 7 process and is more burdensome for all involved—the applicant and the agencies. As other states have found, the ESA incidental take dynamic has created a serious hurdle to establishing an effective and efficient Section 404 program in Florida, where 135 ESA-listed species occur (the third most of any state).[1] It is estimated that approximately ten percent of Section 404 permits issued in Florida require some form of incidental take coverage. This includes many large real estate, mining, agriculture, and utility industry projects with significant economic benefits to the State of Florida and its citizens.

The most efficient and streamlined approach to resolving this issue is a ***one-time*** **ESA Section 7** ***programmatic consultation*** **in connection with EPA's initial review of a state application to assume the Section 404 program.** Section 7 consultation is available in the Section 404 assumption context because of the unique statutory text and legislative history found in Section 404, which differs in critical respects from other state delegation programs administered by EPA where Section 7 does not apply. Under this approach, EPA would consult with the U.S. Fish and Wildlife Service ("USFWS") and the National Marine Fisheries Service ("NMFS") (collectively, the "Services") with regard to EPA's decision whether to approve state

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[1] *See* U.S. Fish and Wildlife Service, *Listed species believed to or known to occur in each State*, available at https://ecos.fws.gov/ecp0/reports/species-listed-by-state-totals-report (last visited June 5, 2019).

assumption of the Section 404 program. This would allow the Services to issue a programmatic Biological Opinion ("BiOp") and a programmatic incidental take statement ("ITS"), which would identify procedural requirements for state permitting under Section 404 needed to support the Services determination that assumption would not result in jeopardy to any listed species. Provided these requirements are followed, the programmatic ITS would bring state Section 404 permits within the Section 7(o)(2) exemption from take liability.

While EPA originally recognized that Section 7 consultation applied to New Jersey's assumption of the Section 404 program, a legally flawed memorandum issued by EPA in 2010 in the Obama Administration essentially reversed that position. EPA's 2010 memorandum resulted from a rushed review, ignored the actual text and legislative history of Section 404, and misapplied Supreme Court precedent. Additionally, because of the unique provisions of Section 404(g) and (h), EPA will not open other program areas to ESA Section 7 by engaging in consultation here. For the reasons explained in this analysis, we believe EPA should return to its original view that approval of state assumptions under Section 404 triggers Section 7 consultation, which will provide substantial benefits to states like Florida with hopes of assuming the Section 404 program. No court has ruled if Section 404 assumption triggers consultation, providing EPA the opportunity to shape this issue in a way that benefits state authority and permitting efficiency.

I. PROGRAMMATIC CONSULTATION AND INCIDENTAL TAKE STATEMENT IN CONNECTION WITH EPA APPROVAL OF ASSUMPTION

A. Conceptual Outline and Benefits of Programmatic Consultation

Because Section 7(a)(2) is framed as a consultation process between *federal* agencies, it does not expressly provide a mechanism for a *state* permitting authority to consult directly with the Services and avail itself of the Section 7(o)(2) exemption from incidental take liability based on an ITS issued through a Section 7(a)(2) consultation process. Instead, as noted above, under current practice, where a state has assumed the Section 404 program, permittees cannot obtain incidental take protection directly from the permitting agency; rather, to gain such protection the permittee must obtain an incidental take permit from the relevant Service under ESA Section 10—a time-consuming and resource-intensive process that, especially in states where listed species are prevalent, render the state program more burdensome than the existing federal program. This loss of Section 7-based incidental take protection is being raised by other states as a hurdle to assuming the Section 404 program in the first place.[2] A programmatic consultation consistent with the Section 7 regulations on the Section 404 assumption decision would efficiently resolve this issue for all parties concerned.[3]

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[2] EPA's decision whether to approve assumption is not subject to review under the National Environmental Policy Act ("NEPA"), regardless of whether EPA consults with the Services in connection with its decision. *See* 33 U.S.C. § 1371(c)(1).

[3] 50 C.F.R. § 402.02 (defining "framework programmatic action" and "mixed programmatic action"); *id.* § 402.14(i)(6) (defining incidental take statement requirements for framework programmatic actions and mixed programmatic actions). *See also* Endangered and Threatened

There is precedent for this type of programmatic consultation and ITS with regard to a state-administered permitting program, such as EPA's Cooling Water Intake Structure Rule. In each case, the Services issued a programmatic "no jeopardy" BiOp and ITS providing incidental take coverage to subsequent state permitting decisions under the relevant program, provided the state agency complied with certain procedural requirements to ensure protection of listed species and designated critical habitat.

B. EPA Approval of Section 404 Assumption May Be Considered a Discretionary Federal Action for ESA Purposes and is Distinguishable from Other Program Delegation Decisions

In 2010, under the Obama Administration, EPA's then-Assistant Administrator for the Office of Water, Peter Silva, issued a two-page memorandum concluding that EPA's decision whether to approve a state application to assume the Section 404 program is not a discretionary federal action and accordingly is not subject to consultation under Section 7.[4] The Silva memo was apparently the result of a brief review, as it was issued on December 27, 2010 in response to a request for clarification from the Environmental Council of States ("ECOS") dated December 6, 2010. Insofar as it is an obstacle to upfront consultation through which a state can obtain a programmatic ITS, the Silva memo has the effect—likely unintended—of hindering state efforts to obtain Section 404 assumption. The Silva memo's conclusion was contrary to EPA's prior agreement to consult informally with the USFWS in connection with New Jersey's application to assume the program, which EPA approved in 1993.[5] More important, while the 2010 Silva memorandum purported to be based on the Supreme Court's decision in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), which involved delegation under Section 402 of the CWA, the 2010 memorandum did not meaningfully analyze the relevant statutory text and legislative history, nor did the memo grapple with the unique characteristics of Section 404 and the implications of its determination on state assumptions.

As explained below, those unique characteristics make clear that Section 404 *does* give EPA discretion to consider the protection of listed species in the context of rendering a decision whether to approve a state's application to assume the Section 404 program. This materially distinguishes Section 404 from the CWA Section 402(b) decision at issue in *National*

Wildlife and Plants; Revision of Regulations for Interagency Cooperation, 83 Fed. Reg. 35,178 (July 25, 2018). Consistent with the discussion in the 2015 rule, the proposed definition states that "[p]rogrammatic consultations allow the Services to consult on the effects of programmatic actions such as . . . [a] proposed program, plan, policy or regulation providing a framework for future proposed actions." *Id.* at 35,191-92.

[4] Letter from Peter S. Silva to R. Steven Brown and Jeanne Christie (Dec. 27, 2010), available at https://www.aswm.org/pdf_lib/silva_reply_on_esa_consultation_12272010.pdf.

[5] After informal consultation and based on the memorandum of agreement ("MOA") completed between EPA, the USFWS, and the New Jersey Department of Environmental Protection and Energy, the USFWS concurred that New Jersey's assumption of the Section 404 program is not likely to adversely affect federally-listed species. *See* Letter from U.S. Fish and Wildlife Service to EPA Acting Regional Administrator William J. Muszynski, dated Dec. 22, 1993, available at https://www.fws.gov/northeast/njfieldoffice/pdf/MOAUSFWS.pdf.

Association of Home Builders, as well as the delegation provisions in each of the other major environmental statutes.

1. ESA Section 7 and *National Association of Home Builders v. Defenders of Wildlife*

National Association of Home Builders involved a challenge—in part for alleged failure to comply with ESA Section 7—to EPA's decision approving transfer of authority to administer the CWA Section 402 national pollution discharge elimination system ("NPDES") permitting program to Arizona within the state. The case turned on the U.S. Department of Interior's regulation, at 50 C.F.R. § 402.03, which provided that ESA "Section 7 and the requirements of this part [*i.e.*, 50 C.F.R. part 402, governing Section 7 consultation] apply to all actions in which there is discretionary Federal involvement or control." The Supreme Court held that (1) 50 C.F.R. § 402.03 was a reasonable interpretation of ESA Section 7 and accordingly entitled to deference; and (2) Section 402(b)—governing EPA decisions on delegation of NPDES permitting authority—did not involve "discretionary Federal involvement or control" and, thus, ESA Section 7 was not implicated.

The Court's holding was predicated on the specific requirements of Section 402(b), which *required* EPA to approve delegation provided the agency determined that the state's permitting program met nine statutorily specified criteria.[6] All of the statutory criteria focused on the sufficiency of the state's authority to implement the program, and none addressed protection of threatened or endangered species. The Court emphasized that, although EPA may exercise some judgment in determining whether a state has authority to carry out the enumerated statutory criteria, Section 402(b) "clearly does not grant [EPA] discretion to add another entirely separate prerequisite. Nothing in the text of section 402(b) authorizes the EPA to *consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application*." *Id.* at 671 (emphasis added). Because EPA was *required* to approve transfer if the statutory criteria were met, and because none of the criteria authorized EPA to "consider the protection of threatened or endangered species as an end in itself," *id.*, EPA lacked discretion to "insure" the protection of threatened or endangered species and Section 7 did not apply. The Court's opinion was focused only on Section 402(b) transfers and made no comment whatsoever about any other state-delegated or state-assumed programs.

2. Unlike Delegation Under CWA Section 402(b), CWA Section 404 Approval May Be Considered a Discretionary Federal Action for ESA Consultation Purposes

As a preliminary matter, EPA's approval or disapproval of state assumption of the Section 404 program is an "action" for purposes of ESA Section 7(a)(2). The Services' regulations governing ESA consultations expressly define "action" to include "the promulgation of regulations," 50 C.F.R. § 402.02, and EPA's approval of state assumption is undertaken

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[6] Section 402(b) provides: "The Administrator shall approve each submitted program unless he determines that adequate authority does not exist" with regard to nine specified criteria. 33 U.S.C. § 1342(b). For the full text of the provision, *see* Appendix A.

through rulemaking.[7] Delegation of authority to states under CWA Section 402 and other similar authorities are also accomplished via rulemaking; but the key issue for ESA Section 7 purposes is, as explained in *National Association of Home Builders*, whether the action is "discretionary" with the agency. Where the action does carry some degree of discretionary federal involvement or control, Section 7 consultation can be triggered.

Specifically, to trigger Section 7 consultation, the statute must give the agency authority to "*consider the protection of threatened or endangered species as an end in itself*" in making the relevant decision. *National Association of Home Builders*, 551 U.S. at 671 (emphasis added). The Supreme Court explained that "Agency discretion presumes that an agency can exercise 'judgment' in connection with a particular action," 551 U.S. at 668, and that "the ESA's requirements would come into play only when an action results from the exercise of agency discretion. This interpretation harmonizes the statutes by giving effect to the ESA's no-jeopardy mandate whenever an agency has discretion to do so, but not when the agency is forbidden from considering such extrastatutory factors," 551 U.S. at 665.

While delegation under Section 402(b) was found to be non-discretionary because EPA "is required by statute to [approve delegation] once certain specified triggering events have occurred," *id.* at 679-80, the analysis under Section 404(g) and (h) reaches an entirely different conclusion. This is clear for several reasons.

First, in stark contrast to Section 402(b), Section 404(g)(2) and (3) expressly require that, when a state applies for assumption, EPA must provide "the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service" an opportunity to comment on a state application for assumption of the 404 program. Relatedly, Section 404(h)(1) expressly requires EPA, in making a determination of whether to approve the state program, to "tak[e] into account any comments submitted by … the Secretary of the Interior, acting through the Director of [USFWS]" under Section 404(g). The USFWS is, of course, responsible for the implementation of the ESA and its consultation requirements. Thus, Section 404(g) expressly requires EPA to receive and consider input specifically focused on the protection of threatened and endangered species. This statutory requirement would be unnecessary (mere surplusage) if EPA were not authorized to consider those comments and thus "consider the protection of threatened or endangered species as an end in itself," *National Association of Home Builders*, 551 U.S. at 671, in determining whether to approve or disapprove assumption. Importantly, CWA Section 402(b) does not include any analogous comment or consideration requirement.

Second, and even more important, Section 404(h)(1) expressly requires EPA, in deciding whether to approve state assumption of the Section 404 program, to determine whether the state has authority "[t]o issue permits which, …apply, and assure compliance with, any applicable

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[7] *See* Michigan Department of Natural Resources Section 404 Permit Program Approval, 49 Fed. Reg. 38,947 (Oct. 2, 1984) (referring to approval as a "rule" and modifying the Code of Federal Regulations to add 40 C.F.R. § 233.42 codifying Michigan's assumption of the program); New Jersey Department of Environmental Protection and Energy Section 404 Permit Program Approval, 59 Fed. Reg. 9933 (Mar. 2, 1994) (referring to approval as a "rule" and modifying the Code of Federal Regulations to add 40 C.F.R. § 233.71 codifying New Jersey's assumption of the program).

requirement of this section, including, but not limited to, the guidelines established under section (b)(1) of this section…." The Section 404(b)(1) Guidelines, codified at 40 C.F.R. Part 230, expressly provide that: "No discharge of dredged or fill material shall be permitted if it … *Jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act* of 1973, as amended, or results in likelihood of the destruction or adverse modification of [critical] habitat." 40 C.F.R. § 230.10(b)(3)(emphasis added). Of critical importance, this express requirement of the 404(b)(1) Guidelines—to insure that the state program is not likely to jeopardize the continued existence of any listed species or likely result in the destruction or adverse modification of critical habitat – is the same requirement, almost word-for-word, found in Section 7(a)(2) of the ESA.

Accordingly, by requiring EPA to take into account the views of the Services and by incorporating consideration of "jeopardy" to species and "adverse modification" of critical habitat via the Section 404(b)(1) Guidelines, Section 404(g) and (h) expressly require EPA to determine whether the state has adequate authority to apply and assure compliance with substantive requirements of the ESA. Neither requirement is part of EPA's Section 402(b) delegation decision. Accordingly—unlike under Section 402(b)—EPA has discretion under Sections 404(g) and (h) to "consider the protection of threatened and endangered species as an end in itself," *National Association of Home Builders*, 551 U.S. at 671, in determining whether to approve a state's application to assume the Section 404 program.

This view is also firmly supported by the legislative history behind Section 404 state assumption. Yet surprisingly, the 2010 Silva memorandum states that the legislative history of Section 404 supports the view that EPA's approve/disapprove decision is nondiscretionary, but does not offer any language or citation in support of that assertion. In fact, the legislative history confirms precisely the opposite. Section 404(g) and (h) were enacted as part of the 1977 amendments to the CWA[8] and these provisions have not been amended since. Specifically, the drafters of these provisions explained that the required consultation between EPA and USFWS with regard to a state application for assumption "*preserves the Administrator's discretion in addressing the concerns of [USFWS], yet affords them reasonable and early participation which can both strengthen the State program and avoid delays in implementation.*"[9]

This statement is from the Senate Report for the 1977 amendments, which explained the rationale for the consultation requirement in Section 404(g) and (h) as follows:

> The Administrator *shall* consult with the Secretary of the Army and the Director of the Fish and Wildlife Service prior to his approval of a State permit program for control of discharges of dredge and fill material (sec. [402(*l*)(2)]).[10] The committee amendments

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[8] Pub. L. 95–217, § 67(b) ("Clean Water Act of 1977," Dec. 27, 1977, 91 Stat. 1600), added subsections (g) and (h) to CWA Section 404.

[9] S. Rep. 95-370, at 78 (1977) (emphasis added).

[10] The precise citation in the report is to "Section 402 (1) (2)," but it clearly appears intended to refer to Section 402(*l*)(2), which would have been added by the Senate bill discussed in the Senate Report. Section 402(*l*) of the Senate bill includes language addressing state assumption of Section 404 that was adapted and later enacted as Section 404(g) and (h).

> relating to the Fish and Wildlife Service are designed to (1) recognize the particular expertise of that agency and the relationship between its goals for fish and wildlife protection and the goals of the Water Act, and (2) encourage the exercise of its capabilities in the early stages of planning. *By soliciting the views of the principal Federal agencies involved in the review of these programs at an early stage, objections can be resolved that might otherwise surface later and impede the operation of a State program approved by the Administrator. This consultation preserves the Administrator's discretion in addressing the concerns of these agencies, yet affords them reasonable and early participation which can both strengthen the State program and avoid delays in implementation.* That is, early participation in the development and design of programs, guidelines, and regulations should serve to reduce the emphasis now placed on the review by the Fish and Wildlife Service of individual applications for permits under the Water Act.[11]

In other words, just as the statutory text discussed above makes clear, the consultation requirement included in Section 404(g) and (h) was intended to ensure that EPA receive and use its discretion to address issues related to protection of fish and wildlife under a state-assumed Section 404 program. Further, the drafters endorsed the notion that the Section 404(g) assumption approval process should be used to strengthen state programs and resolve fish and wildlife-related issues on the front end, to avoid delays in implementation of state programs.[12]

Several other lower court cases have addressed the question whether certain federal actions involve "discretionary Federal involvement or control" (within the meaning of 50 C.F.R. § 402.03) for purposes of determining whether Section 7 applies. These decisions turn on the specific requirements of each statute and whether the agency's interpretation of those requirements (e.g., whether the federal agency has discretionary involvement or control) is entitled to deference. For example, the Eleventh Circuit, quoting directly from *National Association of Home Builders*, has underscored that the test is "whether [the agency] has discretion in administering the [statute] to *consider the protection of endangered or threatened species as an end.*" *Florida Key Deer v. Paulison*, 522 F.3d 1133, 1141 (11th Cir. 2008) (emphasis added). In *Florida Key Deer*, the Eleventh Circuit held that test was met where the statute required the Federal Emergency Management Agency to determine whether to make flood insurance available based on whether local governments had adequate land use and control measures, employing criteria the agency developed. *Id.*[13]

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[11] S. Rep. 95-370, at 78 (1977) (emphasis added).

[12] "[I]t is intended that the Agency bear in mind the potential cost to individual companies, entire industries, and the economy at large to result if the act is not administered as intended by the Congress. As reflected by the conference report on H.R. 3199, these concerns are prominent among those motivating this legislation." 123 Cong. Rec. 38,975 (1977) (statement by Rep. Clausen); *see also* H.R. Rep. No. 95-830 (Conf. Rep.), at 101 (1977).

[13] *See also Natural Resources Defense Council v. Jewell*, 749 F.3d. 776, 784 (9th Cir. 2014) ("Whether an agency must consult does not turn on the *degree* of discretion that the agency exercises regarding the action in question, but on whether the agency has *any* discretion to act in a manner beneficial to a protected species or its habitat." (emphasis added)); *Karuk Tribe v. U.S.*

Similarly, under Section 404(g) and (h), EPA must determine the adequacy of a state's authority to administer the Section 404 program based on the Section 404(b)(1) guidelines developed by EPA—including the requirement to assure compliance with the exact same requirements relevant to Section 7 consultation. EPA therefore appears to have discretion to consider the protection of listed species in determining whether to approve state assumption, and that—in anticipation of a state application for assumption—EPA can influence the state's development and implementation of its program to ensure that it provides adequate protections for listed species, including through technical assistance.[14] In all these respects, contrary to the cursory analysis in the Obama Administration's 2010 Silva memorandum (which notably fails entirely to address the specific text of Sections 404(g) or 404(h)), Section 404 is materially different from Section 402(b) with regard to the potential application of Section 7 consultation.[15]

3. Section 404 Approval is Distinguishable from Section 402 Delegation and Other Delegation Decisions

Section 404 is also distinguishable from the state delegation or primacy provisions (and implementing regulations) for each of the other major environmental statutes administered by EPA, and as a result, a decision by EPA to engage in Section 7 consultation when approving/disapproving state assumption applications under CWA Section 404 will have no adverse precedential effect for other program areas.

At a minimum, this is true with respect to Clean Air Act Sections 111 and 112; Safe Drinking Water Act Sections 1413 (state primacy with regard to regulation of public water

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Forest Service, 681 F.3d 1006, 1024-25 (9th Cir. 2012) ("The relevant question is whether the agency could influence [third-party] activity to benefit a listed species, not whether it must do so"). The D.C. Circuit does not appear to have issued any decisions addressing the question raised by *National Association of Home Builders*.

[14] *See* H.R. Rep. No. 97-830 (Conference Report), at 101 (1977) ("If, with respect to a State program submitted under subsection (g) of section 404, the Administrator determines that the State has the requisite authority to carry out the program he shall approve the program and notify the Secretary who shall suspend the issuance of permits under subsections (a) and (e) of that section for activities covered by the State Program. If the Administrator determines that the State does not have the requisite authority to administer the program, he must so notify the State which notification is to include any revisions or modifications necessary so that the State can resubmit the program for a new determination by the Administrator."). *See also* EPA, Basic Information about Assumption under CWA Section 404 ("States or tribes should work with their respective EPA Regional Office 'early and often' during the preparation of the Section 404 assumption package to ensure it is complete.... [S]tates or tribes are encouraged to coordinate with all parties during the development of the package before official submission."), at https://www.epa.gov/cwa404g/basic-information-about-assumption-under-cwa-section-404 (visited June 2, 2019).

[15] Additionally, we note that under Section 7(a)(1), all federal agencies, including EPA "shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species. . . .". 16 U.S.C. § 1536(a)(1).

systems) and 1425 (state primacy with regard to implementation of the Underground Injection Control program); Section 3006(b) of the Resource Conservation and Recovery Act; and Section 26 of the Federal Insecticide, Fungicide, and Rodenticide Act.[16] Each of these statutes includes provisions identifying criteria for EPA approval of state primacy or delegation to states of defined regulatory authorities. Importantly, however, none of these provisions requires EPA to consult with the Secretary of the Interior or the Director of USFWS. Similarly, none predicates EPA's decision with regard to state delegation or primary on meeting substantive criteria analogous to the CWA Section 401(b) guidelines. Unlike Section 404, therefore, these other statutory provisions do not authorize EPA to consider protection of listed species as an end in itself in making a delegation or primacy decision, and—under 50 C.F.R. § 402.03—Section 7 accordingly would not apply.

C. EPA Could Take This Approach as a Permissible Interpretation of CWA Section 404

While Section 404 of the CWA *clearly* gives EPA discretion to consider ESA impacts, EPA could find that Section 404 is *at least ambiguous* with regard to whether EPA has that discretion. In light of such ambiguity, EPA would be free to adopt a permissible interpretation of Section 404(g) and (h) to the effect that, based on its reading of the statute in light of the text, legislative history and various policy considerations, such discretion does exist and allows for EPA to engage in Section 7 consultation when approving state assumptions. To the extent the courts agree that the statute is ambiguous, EPA's view would likely receive deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[17]

D. Key Precedent: Cooling Water Intake Structure Rule

There are precedents for the type of programmatic consultation and ITS described above; one we highlight here is the EPA's Cooling Water Intake Structure Rule, promulgated under CWA Section 316(b) in 2014, 79 Fed. Reg. 48300 (Aug. 15, 2014) ("316(b) Rule").[18] The 316(b) Rule establishes federal technology-based standards for cooling water intake structures ("CWIS"), intended to address impacts to aquatic life from entrainment or impingement of fish and shellfish. In virtually all states, state permitting authorities implement the rule's requirements through state-issued permits. The rule requires permit applicants to provide information regarding potential impacts on listed species and authorizes permit authorities to establish additional requirements to protect such species. Further, it establishes procedural requirements for permitting authorities to transmit permit applications to the Services and to provide an opportunity for the Services to review and comment on such applications—including

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[16] *See* Appendix A.

[17] This is different than the argument, discussed in the *National Association of Homebuilders* case, that the Services' interpretation of the regulation found at 50 C.F.R. § 402.03 is entitled to deference as a permissible interpretation of Section 7 of the ESA.

[18] Section 316(b) provides: "Any standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." 33 U.S.C. § 1326(b).

recommended measures to address impacts to listed species. In addition, the rule's preamble emphasized the importance of a preexisting memorandum of agreement between EPA and the Services, which provides that "EPA will use the full extent of its CWA authority to object to a permit where EPA finds that issuance of the permit is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat." 79 Fed. Reg. at 48,382. In other words, EPA through the memorandum of agreement effectively committed itself in advance to exercise its objection authority (informed, of course, by input from the Services) to ensure that state-issued permits under Section 316(b) would adequately protect listed species and designated critical habitat.

Under ESA Section 7(a)(2), EPA consulted with the Services with regard to the 316(b) Rule.[19] The Services determined that the proposed action was likely to adversely affect listed species, and issued a "no jeopardy" Programmatic BiOp as well as a programmatic ITS covering implementation of the rule.[20] The ITS provides, in relevant part:

> Incidental take exemption will be afforded to EPA when the Rule, including its implementation process, is carried out as described in this Opinion. In addition, any take incidental to the operation of a CWIS permitted under the Rule through the implementation process described in this Opinion will be exempt from Section 9 and Section 4(d) prohibitions if the owner/operator implements enforceable control measures, monitoring, and reporting as agreed upon by the owner/operator and the Services, and as reflected in the permit.[21]

The BiOp describes the "technical assistance" process for the 316(b) Rule as follows:

- ESA-listed species and/or critical habitat that occurs in the action area for a facility and impacted by CWIS will be identified by the owner or operator and provided to the Services for verification;

- The [State Permit] Directors are required to send all permit application information to the Services and provide the Services with 60 days to review the information. If the Services provide control measures, monitoring or reporting

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[19] Section 316(b) requires EPA to establish standards reflecting the "best technology available for minimizing adverse environmental impact." 33 U.S.C. § 1326(b). It is undisputed that this provision (unlike Section 402(b), discussed below, for example) provides EPA with discretion to address impacts to listed species and designated critical habitat. EPA sought informal consultation with the Services with regard to the Section 316(b) rulemaking, but was unable to obtain their concurrence on EPA's "not likely to adversely affect" finding. Accordingly, EPA requested formal consultation.

[20] Endangered Species Act Section 7 Consultation, Programmatic Biological Opinion on the U.S. Environmental Protection Agency's Issuance and Implementation of the Final Regulations, Section 316(b) of the Clean Water Act (May 19, 2014), available at https://www.epa.gov/sites/production/files/2015-04/documents/final_316b_bo_and_appendices_5_19_2014.pdf.

[21] *Id.* at 76.

requirements to reduce impacts associated with CWIS to the Director, the Director may include those in the permit;

- If the Director does not include the control measures, monitoring or reporting requirements recommended by the Services and the Services have concerns that a permit will have more than minor detrimental effects on federally-listed species or critical habitat and contact EPA with their concerns:

  i. EPA will coordinate with the State or Tribe to ensure that the permit will comply with all applicable CWA requirements and will discuss appropriate measures protective of federally-listed species and critical habitat;

  ii. EPA will work with the State or Tribe to reduce or remove the detrimental impacts of the permit, including, in appropriate circumstances, by objecting to and federalizing the permit where consistent with EPA's CWA authority; and

  iii. EPA will exercise the full extent of its CWA authority, to object to a permit proposed by a State where EPA finds (giving deference to the views of the Services) that a State or Tribal permit is likely to jeopardize the continued existence of such species or result in the destruction or adverse modification of such critical habitat.

- Based on correspondence received from EPA on April 8, 2014, EPA will give deference to the views of the Services with regard to effects on federally-listed fish and wildlife resources.[22]

Environmental organizations challenged the 316(b) Rule, Biological Opinion, and ITS in the U.S. Court of Appeals for the Second Circuit. The Second Circuit rejected these challenges and upheld the rule, the BiOp, and the ITS.[23] Notably, the court held (1) that, given the

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[22] *Id.* at 56. Notably, the assumption regulations require coordination with the Services, including provision of each public notice for an individual permit and each general permit for review and comment, including on consistency with the Section 404(b)(1) Guidelines, along with other information the Regional Administrator may require in developing comments or an objection on the permit as part of the EPA oversight process. 40 C.F.R. § 233.50. Coordination between the Services and the state in advance of this process will significantly minimize the potential for conflict and delay in the permitting process, and also facilitate oversight.

[23] *Cooling Water Intake Structure Coal. v. EPA*, 905 F.3d 49, 76-77 (2d Cir. 2018). Notably, the Second Circuit brief for EPA and the Services specifically explained how the Programmatic ITS is intended to function: "[T]here is powerful incentive for permit applicants to implement the control measures, monitoring, and reporting requirements developed through the technical assistance process and specified in the permit, in order to receive an exemption from the prohibition against take. SPA 211, 213 (BiOp at 64, 66). While a facility could also obtain a take exemption pursuant to ESA §10, that process would require the facility to develop a habitat conservation plan that specifies the anticipated effects of the proposed taking, how those impacts will be minimized or mitigated, and explanation of the rejected alternatives considered by the

agencies' explanation of the paucity of available information and their commitment to the technical assistance process, the ITS was valid despite its failure to numerically quantify the impacts of the rule on take; and (2) that the ITS's requirement that EPA follow the technical assistance process set forth in the rule, and exercise its related oversight authority to address impacts on listed species, was adequate.[24]

E. Implementing Programmatic Consultation and Streamlining the Process

1. Procedures for Programmatic Consultation Regarding Approval of State Assumption of the Section 404 Program

The Services' existing consultation regulations—and proposed changes to those regulations expected to be finalized shortly—expressly authorize the Services to conduct programmatic consultation.

Procedurally, EPA would be required to submit to the Services a biological assessment supporting its request for consultation on the assumption decision, but to facilitate the process, the state could develop this assessment on EPA's behalf or in cooperation with EPA,[25] for development of a BiOp (and potentially a memorandum of understanding) that relies on technical assistance from the Services to ensure that any authorized take is consistent with the programmatic BiOp. Section 404(h) requires EPA to approve or disapprove a state assumption application within 120 days; if EPA fails to affirmatively approve or disapprove the application, it is deemed approved. However, EPA's assumption regulations expressly provide that EPA and the state can extend this and related deadlines by agreement. 40 C.F.R. § 233.15(c). Regardless, to ensure expeditious approval of assumption and issuance of the accompanying BiOp and ITS, it would be important that the state seeking assumption work closely with EPA and the Services to prepare the biological evaluation or assessment supporting consultation in advance of submitting its application for assumption.

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applicant. 79 Fed. Reg. at 48,380 (summarizing Section 10 permit requirements). Here, facilities have an incentive to comply with the technical assistance process and recommendations in order to obtain incidental take exemptions as part of their compliance with the NPDES permit process instead of going through a separate, additional process under ESA §10." *See also Cooling Water Intake Structure Coal. v. EPA*, 905 F.3d at n. 14 (finding that "[t]he 'agency action' subject to consultation here was the EPA's promulgation of the Rule" and that the effects of future state permits on ESA-listed species were properly analyzed as "indirect effects").

[24] *Id.*

[25] A Federal agency may designate a "non-Federal representative" to conduct informal consultation or prepare a biological assessment by giving written notice to the Services of such designation. 50 C.F.R. § 402.08; *see also* 50 C.F.R. § 402.02 ("designated non-Federal representative" refers to the entity designated by the Federal action agency as its representative to conduct informal consultation and/or to prepare any biological assessment.").

2. State Section 404 Regulations: Safeguards for Listed Species

From a substantive perspective, Florida's draft proposed Section 404 regulations incorporate requirements—as required by the CWA Section 401(b) guidelines and therefore by CWA Section 404(h)—that "insure" that a state-assumed Section 404 program is "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat." For example, the draft regulations include the following provisions:

- A requirement that no individual permit shall be issued where the project is inconsistent with the CWA, including the Section 401(b) guidelines codified at 40 C.F.R. part 230 (which includes the listed species and critical habitat protection discussed above).[26]

- Requirements that no individual or general permit shall be issued that jeopardizes the continued existence of listed species or critical habitat.[27]

- A requirement that no individual permit shall be issued that causes or contributes to significant degradation of jurisdictional waters, including significant adverse effects on life stages or aquatic life and other wildlife dependent on aquatic ecosystems.[28]

- A provision stating that no activity is authorized under any general permit that "may affect" a listed species or critical habitat, unless the state has consulted with federal and/or state wildlife agencies and appropriate measures to address the effects of the proposed activity have been implemented or are required as a specific condition to the general permit.[29]

These and related requirements, which would be enforceable through judicial review under state law, ensure that the state has both the authority and the obligation to ensure that state-issued permits issued after assumption will adequately protect listed species.

3. EPA Oversight of State Permitting Decisions: Federal Backstop Authority

In addition to the substantive requirements of the state's regulations for Section 404 permits, EPA's residual authority to oversee *individual state permitting decisions* (possibly supplemented by a new memorandum of understanding) provide a *federal backstop mechanism* to ensure that listed species are adequately protected in state permitting decisions. An advantage

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[26] F.A.C. § 62.331.053(3) (May 10, 2018 Draft).

[27] *Id.*; F.A.C. § 62.331.201(k) (May 10, 2018 Draft).

[28] F.A.C. § 62.331.053(3) (May 10, 2018 Draft).

[29] F.A.C. § 62.331.201(k) (May 10, 2018 Draft).

to this approach is that it will help ensure that EPA seldom (or perhaps never) needs to reject a state-issued 404 permit on ESA grounds.

Specifically, Section 404(j) and EPA's regulations provide that the state is required to present to EPA copies of all permit applications submitted to the state for approval and EPA must provide copies of those applications to the USFWS for review and an opportunity to comment. 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(b). EPA cannot waive review of permits for "discharges with a reasonable potential for affecting listed species as determined by [USFWS]." 40 C.F.R. § 233.51(b)(2). EPA must notify the state of any comments, objections, or recommendations, and the reasons for such, and the actions the state must take in order to eliminate any objections. EPA may object to the proposed permit on the grounds that it does not comply with the requirements of the Clean Water Act and/or the Section 404(b)(1) guidelines, which, again, include the listed species protections discussed above. 40 C.F.R. § 233.50(e). When a state has received an EPA objection or requirement for a permit condition to the proposed permit, the state cannot issue the proposed permit unless it takes the steps required by EPA to eliminate the objection or EPA withdraws the objection. 40 C.F.R. § 233.50(f), 233.50(h). Taking a programmatic approach will in no way inhibit the exercise of EPA's backstop authority. It will, however, through the technical assistance process allow the state to directly address any Service comments and potential concerns during permitting, thereby minimizing the need for the exercise of federal backstop authority.

Appendix A: Key Statutory Provisions Governing Delegation, Primacy, and Assumption

Clean Water Act Sections 404(g) and (h) (33 U.S.C. § 1344(g) and (h))

"**(g) State administration**

(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

(2) Not later than the tenth day after the date of the receipt of the program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall provide copies of such program and statement to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service.

(3) Not later than the ninetieth day after the date of the receipt by the Administrator of the program and statement submitted by any State, under paragraph (1) of this subsection, the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such program and statement to the Administrator in writing.

(h) Determination of State's authority to issue permits under State program; approval; notification; transfers to State program

(1) Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority with respect to the issuance of permits pursuant to such program:

(A) To issue permits which--

(i) apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title;

(ii) are for fixed terms not exceeding five years; and

(iii) can be terminated or modified for cause including, but not limited to, the following:

(I) violation of any condition of the permit;

(II) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(III) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

(B) To issue permits which apply, and assure compliance with, all applicable requirements of section 1318 of this title, or to inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title.

(C) To assure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.

(D) To assure that the Administrator receives notice of each application (including a copy thereof) for a permit.

(E) To assure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.

(F) To assure that no permit will be issued if, in the judgment of the Secretary, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby.

(G) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

(H) To assure continued coordination with Federal and Federal-State water-related planning and review processes.

(2) If, with respect to a State program submitted under subsection (g)(1) of this section, the Administrator determines that such State--

(A) has the authority set forth in paragraph (1) of this subsection, the Administrator shall approve the program and so notify (i) such State and (ii) the

Secretary, who upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsections (a) and (e) of this section for activities with respect to which a permit may be issued pursuant to such State program; or

(B) does not have the authority set forth in paragraph (1) of this subsection, the Administrator shall so notify such State, which notification shall also describe the revisions or modifications necessary so that such State may resubmit such program for a determination by the Administrator under this subsection.

(3) If the Administrator fails to make a determination with respect to any program submitted by a State under subsection (g)(1) of this section within one-hundred-twenty days after the date of the receipt of such program, such program shall be deemed approved pursuant to paragraph (2)(A) of this subsection and the Administrator shall so notify such State and the Secretary who, upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsection (a) and (e) of this section for activities with respect to which a permit may be issued by such State.

(4) After the Secretary receives notification from the Administrator under paragraph (2) or (3) of this subsection that a State permit program has been approved, the Secretary shall transfer any applications for permits pending before the Secretary for activities with respect to which a permit may be issued pursuant to such State program to such State for appropriate action.

(5) Upon notification from a State with a permit program approved under this subsection that such State intends to administer and enforce the terms and conditions of a general permit issued by the Secretary under subsection (e) of this section with respect to activities in such State to which such general permit applies, the Secretary shall suspend the administration and enforcement of such general permit with respect to such activities.

Clean Water Act Section 402(b) (33 U.S.C. § 1342(b))

"**(b) State permit programs**

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. **The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:**

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

Clean Air Act Sections 111 and 112

Section 111 (42 U.S.C. § 7411(c)):

"**(c) State implementation and enforcement of standards of performance**

(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. **If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.**

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section."

Section 112 (42 U.S.C. § 7412(l))

"(1) In general

Each State may develop and submit to the Administrator for approval a program for the implementation and enforcement (including a review of enforcement delegations previously granted) of emission standards and other requirements for air pollutants subject to this section or requirements for the prevention and mitigation of accidental releases pursuant to subsection (r) of this section. A program submitted by a State under this subsection may provide for partial or complete delegation of the Administrator's authorities and responsibilities to implement and enforce emissions standards and

prevention requirements but shall not include authority to set standards less stringent than those promulgated by the Administrator under this chapter.

. . . .

(5) Approval or disapproval

Not later than 180 days after receiving a program submitted by a State, and after notice and opportunity for public comment, the Administrator shall either approve or disapprove such program. **The Administrator shall disapprove any program submitted by a State, if the Administrator determines that—**

(A) the authorities contained in the program are not adequate to assure compliance by all sources within the State with each applicable standard, regulation or requirement established by the Administrator under this section;

(B) adequate authority does not exist, or adequate resources are not available, to implement the program;

(C) the schedule for implementing the program and assuring compliance by affected sources is not sufficiently expeditious; or

(D) the program is otherwise not in compliance with the guidance issued by the Administrator under paragraph (2) or is not likely to satisfy, in whole or in part, the objectives of this chapter.

. . . ."

Safe Drinking Water Act Sections 1413 and 1425

Section 1413 (42 U.S.C. § 300g-2(a)) (Regulation of Public Water Systems):

"(a) In general

For purposes of this subchapter, a State has primary enforcement responsibility for public water systems during any period for which the Administrator determines (pursuant to regulations prescribed under subsection (b)) that such State--

(1) has adopted drinking water regulations that are no less stringent than the national primary drinking water regulations promulgated by the Administrator under subsections (a) and (b) of section 300g-1 of this title not later than 2 years after the date on which the regulations are promulgated by the Administrator, except that the Administrator may provide for an extension of not more than 2 years if, after submission and review of appropriate, adequate documentation from the State, the Administrator determines that the extension is necessary and justified;

(2) has adopted and is implementing adequate procedures for the enforcement of such State regulations, including conducting such monitoring and making such inspections as the Administrator may require by regulation;

(3) will keep such records and make such reports with respect to its activities under paragraphs (1) and (2) as the Administrator may require by regulation;

(4) if it permits variances or exemptions, or both, from the requirements of its drinking water regulations which meet the requirements of paragraph (1), permits such variances and exemptions under conditions and in a manner which is not less stringent than the conditions under, and the manner in which variances and exemptions may be granted under sections 300g-4 and 300g-5 of this title;

(5) has adopted and can implement an adequate plan for the provision of safe drinking water under emergency circumstances including earthquakes, floods, hurricanes, and other natural disasters, as appropriate;

(6) has adopted and is implementing procedures for requiring public water systems to assess options for consolidation or transfer of ownership or other actions in accordance with the regulations issued by the Administrator under section 300g-3(h)(6) of this title; and

(7) has adopted authority for administrative penalties (unless the constitution of the State prohibits the adoption of the authority) in a maximum amount--

(A) in the case of a system serving a population of more than 10,000, that is not less than $1,000 per day per violation; and

(B) in the case of any other system, that is adequate to ensure compliance (as determined by the State);

except that a State may establish a maximum limitation on the total amount of administrative penalties that may be imposed on a public water system per violation.

Section 1425 (42 U.S.C. § 300h-1(b)) (Underground Injection Control Programs):

"**(b) State applications; notice to Administrator of compliance with revised or added requirements; approval or disapproval by Administrator; duration of State primary enforcement responsibility; public hearing**

(1)(A) Each State listed under subsection (a) shall within 270 days after the date of promulgation of any regulation under section 300h of this title (or, if later, within 270 days after such State is first listed under subsection (a)) **submit to the Administrator an application which contains a showing satisfactory to the Administrator that the State—**

(i) has adopted after reasonable notice and public hearings, and will implement, an underground injection control program which meets the requirements of regulations in effect under section 300h of this title; and

(ii) will keep such records and make such reports with respect to its activities under its underground injection control program as the Administrator may require by regulation.

The Administrator may, for good cause, extend the date for submission of an application by any State under this subparagraph for a period not to exceed an additional 270 days.

(B) Within 270 days of any amendment of a regulation under section 300h of this title revising or adding any requirement respecting State underground injection control programs, each State listed under subsection (a) shall submit (in such form and manner as the Administrator may require) a notice to the Administrator containing a showing satisfactory to him that the State underground injection control program meets the revised or added requirement.

(2) Within ninety days after the State's application under paragraph (1)(A) or notice under paragraph (1)(B) and after reasonable opportunity for presentation of views, the Administrator shall by rule either approve, disapprove, or approve in part and disapprove in part, the State's underground injection control program.

(3) **If the Administrator approves the State's program under paragraph (2), the State shall have primary enforcement responsibility for underground water sources until such time as the Administrator determines, by rule, that such State no longer meets the requirements of clause (i) or (ii) of paragraph (1)(A) of this subsection.**

(4) Before promulgating any rule under paragraph (2) or (3) of this subsection, the Administrator shall provide opportunity for public hearing respecting such rule."

Resource Conservation and Recovery Act Hazardous Waste Provision Section 3006(b) (42 U.S.C. § 6926)

"**(b) Authorization of State program**

Any State which seeks to administer and enforce a hazardous waste program pursuant to this subchapter may develop and, after notice and opportunity for public hearing, submit to the Administrator an application, in such form as he shall require, for authorization of such program. Within ninety days following submission of an application under this subsection, **the Administrator shall issue a notice as to whether or not he expects such program to be authorized, and within ninety days following such notice (and after opportunity for public hearing) he shall publish his findings as to whether or not the conditions listed in items (1), (2), and (3) below have been met**. Such State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of

hazardous waste (and to enforce permits deemed to have been issued under section 6935(d)(1) of this title) unless, within ninety days following submission of the application the Administrator notifies such State that such program may not be authorized and, within ninety days following such notice and after opportunity for public hearing, he finds that (1) such State program is not equivalent to the Federal program under this subchapter, (2) such program is not consistent with the Federal or State programs applicable in other States, or (3) such program does not provide adequate enforcement of compliance with the requirements of this subchapter. In authorizing a State program, the Administrator may base his findings on the Federal program in effect one year prior to submission of a State's application or in effect on January 26, 1983, whichever is later."

Federal Insecticide, Fungicide, and Rodenticide Act Section 26 (7 U.S.C. § 136w-1(a))

"**(a) In general**

For the purposes of this subchapter, **a State shall have primary enforcement responsibility for pesticide use violations during any period for which the Administrator determines that such State**—

(1) has adopted adequate pesticide use laws and regulations, except that the Administrator may not require a State to have pesticide use laws that are more stringent than this subchapter;

(2) has adopted and is implementing adequate procedures for the enforcement of such State laws and regulations; and

(3) will keep such records and make such reports showing compliance with paragraphs (1) and (2) of this subsection as the Administrator may require by regulation."